UNIVERSITY LIBRARY LAW COLLEGE

The Madras Law Journal.

PART XII.] DECEMBER 1899. [VOL. IX.

DEPOSIT OF TITLE DEEDS.

This is known in English Law as an equitable mortgage, as distinct from a legal mortgage.

Whether before the Transfer of Property Act an equitable mortgage could be created out of the Presidency Towns is rather a difficult question. No doubt the Privy Council in *Varden Seth Sam* v. *Luckpathy Royjee Lallah,* 9 M. I. A., p. 307, held that a deposit of title-deeds made in the particular case in the Presidency Town of Madras constituted an equitable mortgage though it was only known to the English Law, the decision being based upon the fact that, as the English Law was in force in the Presidency Town it might be presumed that the parties intended to be governed by that Law and that moreover it was in consonance with justice, equity and good conscience. Their Lordships in reversing the decision of Sudder Dewanny Adawlut observed at p. 324.

"The decision of the Sudder Dewanny Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English Law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law of the Company's Courts were insisted on. There is properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity and good conscience. The question then is, whether the decision appealed against violates that direction or not . . . . . The Plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect being given to the actual agreement of the parties to create that lien the court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been in

like manner, denied to it as a perfected lien. But nothing of the sort is suggested . . . . . It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race or creed . . . . . The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ* exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made; that is, the English Law, the deposit of title-deeds as a security would create a lien on lands; though, as between parties who can convey by deed only or conveyance in writing such lien would necessarily be equitable."

In the case of *Himalaya Bank, Limited, in Liquidation* v. *F. W. Quarry*, I. L. R., 17 A., p. 252, it was held that before the Transfer of Property Act a deposit of title-deeds made in the Mofussil created a good equitable mortgage and as such was binding on the parties. The facts of that case were as follows: One F. W. Quarry overdrew his account with the Himalaya Bank. The Bank took on the 3rd May 1878 deposit of the title-deeds relating to Quarry's pro-property in Mussooree known as the Powy's Cottage estate. The transaction took place in the Mofussil, (Mussooree). Mr. Justice *Blair* observed at p. 256.

"It seems to me that there can be no question whatever that the deposit of deeds as security for an overdrawn account constitutes in English Law a good equitable mortgage and in Indian Law a good simple mortgage. It seems to me clear that upon grounds of common sense as well as authority it is reasonable to infer from the continuance for a long time of the deposit of title-deeds that they are intended, as between the parties, as security for a continued contemporaneous over-draft. I feel no doubt, therefore, that if the facts set forth by the plaintiff are proved, a perfectly good and efficient security was created by the deposit of these deeds in 1878." *Burkitt*, J., observed at p. 260: "Broadly stated the 1st defendant's contention is that S. 59 of the Transfer of Property Act, No. IV of 1882, did no more than codify the law as it existed when that Act was passed, and that as the first clause of that section undoubtedly now prevents the creation in the Mofussil of a mortgage by delivery of documents of title to immoveable property by a creditor with intent to create a security for Rs. 100 or upwards, it follows that such a mortgage was unknown to the law in the Mofussil

previous to the coming into force of Act IV of 1882, and cannot be enforced by suit.

In that contention I am unable to accede. I am of opinion that S. 59 of the Transfer of Property Act did make a very great and important change in the law. Before that Act came into force there was no law at all resembling the Statute of Frauds in force in the Mofussil. There was no enactment which required that a transaction of the nature of a mortgage securing Rs. 100 or upwards should be in writing and registered. The law then made no provision requiring contracts, *e.g.*, of mortgage or sale, to be in any particular form. Contracts might be oral or in writing, but, if reduced to writing, the Registration Act required that in certain circumstances, they should be registered.

That which a Court, bound to decide according to 'justice, equity and good conscience' in the absence of any express enactment has to look at is the intention of the parties to an agreement, and, on ascertaining that agreement, it is the duty of the Court to enforce it, if it be a lawful contract, without imposing on the parties to it a particular form which the law as it stood when the contract was made, did not require. Their Lordships of the Privy Council in 14 I. A., p. 89, interpret 'equity and good conscience to mean the rule of English Law if found applicable to Indian society and circumstances.' Now, bearing in mind *who the parties to this suit are* and the strong probabilities that they intended to contract according to English Law, it is difficult to imagine why the alleged contractual agreement (which is one of a nature recognized and enforced by the English Law) should be considered to be inapplicable to them. In *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (9 M. I. A., p. 307) at pp. 324 and 325 their Lodrships of the Privy Council, applying the rule of 'justice, equity and good conscience' distinguishing between the *lex loci rei sitæ*, (*i.e*, the Mofussil) and the *lex loci contractus* (*i.e.*, the Presidency Town of Madras) held that the former law did not forbid the creation of a lien by a contract such as that sued on in the present case, *i.e.*, by deposit of title-deeds. The 1st defendant contends that the case is not in point, as the deposit was made within the Presidency Town. I, however, regard the observations of their Lordships as a clear authority for the proposition that no law existed forbidding the creation of a mortgage lien by deposit of title-deeds in the Mofussil of the Madras Presidency . . . . . I have come to the conclusion that up to July 1882, there was no difference between the law in the Mofussil and that prevalent in the Presidency Towns as

to the validity of a mortgage created on a deposit of title-deeds with a creditor with intent to secure a debt."

But be that as it may by the Transfer of Property Act, S. 59, it is now declared, that

"Where the principal money secured is Rs. 100 or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses where the principal money secured is less than Rs. 100 a mortgage may be effected *either by an instrument* signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the Towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon."

From the latter part of the section it is, therefore, apparent that delivery of title-deeds *except in the towns named* is of no effect and does not create any valid interest or charge in property (vide *Coggan* v. *Pogose,* I. L. R., 11 C., 158, at p. 160). For by the two former parts of the section a mortgage must be effected only in the modes prescribed therein and if not made in the mode prescribed therein no mortgage is created. The only exception that is made to it is that a deposit of title-deeds to a creditor or his agent of property (*wherever it may situate*) with intent to create security is a good mortgage.

Mr. Macpherson in his Book on Mortgages, p. 657, says that though a mortgage cannot be made by simple delivery of documents of title in other places than those named, yet the transaction would create a charge; for he says "by it (Sec. 100) immoveable property is by act of parties made security for payment of money to another, whilst owing to the provisions of this section (59), the transaction does not amount to a mortgage. If so, then the effect of delivery of title-deeds with the intent stated in the section would not appear to be very different whether the delivery was made within or beyond the limits of the towns specified, though no doubt the rights of a person having a charge are not so extensive as those of a mortgagee." This, it is submitted, is incorrect. If the parties intended to create a mortgage by a particular transaction and that transaction becomes infructuous by reason of

the prohibition of the Statute or some defect of formality prescribed by the Statute and the law says that no mortgage could arise out of the said transaction, no charge could arise by the fact that the parties intended that they should have some security. For example, if a mortgage deed is executed, but it is attested by only one witness instead of by two witnesses as required by the Statute then the said deed could not be proved and no mortgage in law is created. It could not be said that because the parties intended that there should be some sort of security, therefore, effect should be given to the transaction as creating a charge when effect could not be given to it, by reason of some cause created by the Statute, as a mortgage, vide *Madras Deposit and Benefit Society v. Oonnamalai Ammal*, I.L. R., 18 M., p. 29 at p. 30. Indeed if it should be held that the deposit of title-deeds in Mofussil can create a charge then it is doing indirectly what the Statute says ought not to be done or at any rate what the Statute does not recognize. For if some lien is created by the fact of the deposit outside Presidency Towns then the Statute would have expressly provided for it instead of declaring that only deposits made in the Presidency Towns are valid. Moreover it is begging the question to say that under section 100 a charge is created. For under the section a charge exists either by act of parties or by operation of law. The transaction created by deposit is one arising from act of parties. It cannot be said that by operation of law a charge is created. For we can find no law to that effect. Then it is one arising by act of parties. Section 59 says deposit (with the intent to give security) would not do except in the cases mentioned therein. Where the Law says that where parties enter into a particular transaction it must be in certain forms and invalidates such transaction if the prescribed formalities are not observed or where the Law says that certain transactions are only valid in certain places, then it is idle to say that notwithstanding those provisions effect should be given to it in some from or other, for one cannot do indirectly what the law prohibits. That appears to be the principle on which the decision in I. L. R., 18 M., p. 29, is based.

Of course even in the Mofussil the deposit of title-deeds would be some evidence of a contract to mortgage, where one exists, for instance, when a party agrees to execute a mortgage but before the

execution of the mortgage deed the debtor wants money urgently and offers to deposit title-deeds as evidence of his assent to execute the proper deeds, when called upon and asks the creditor to pay in advance and he so advances then the deposit of title-deeds is evidence of a contract to mortgage. But a contract to mortgage just as a contract to sell does not by itself create any security. It only enables the creditor to obtain specific performance of the agreement when he will be able to get a legal mortgage. But mere possession of title-deeds without evidence of the contract originating it does not create any security. Vide *Dickson* v. *Muckleston,* L. R., 8 Ch., p. 155. Of course where the relation of debtor and creditor subsists, the mere fact of possession of deeds by the latter generally raises a presumption that they were deposited with him as security for the debt; and it lies upon the debtor to rebut the presumption (Robbins' Law of Mortgages, p. 59).

Of course the last para. of the section (59) does not require that the property should be situated in the Presidency towns, so that the deposit of the title-deeds of property situated in the Mofussil but made in the towns aforesaid creates a good mortgage (See Macpherson, p. 657 and *Manekji Framji* v. *Rustomji Naserwanji Mistry,* I. L. R., 14 B., p. 269 at p. 271 and *Madho Das* v. *Ram Kishen,* I. L. R., 14 A., p. 238 at p. 241 and *Srinath Roy* v. *Godadhur Das,* I. L. R., 24 C., p. 348 at p. 349).

Another point noticeable in the provision is that the section (59) seems to make no distinction between legal and equitable mortgages as existing in English Law. The Transfer of Property Act indeed makes no distinction between Law and Equity, for the Act embodies or purports to embody the rule of Equity. Mortgages now exist in India under and by virtue of the Act. The only distinction drawn by the Act is that between mortgage and charge. Section 59 declares in what ways mortgages can be created (and deposit of title-deeds is one method) while section 100 deals with the case of a charge though necessarily there is no exhaustive treatment of the modes in which a charge is created.

A mortgage by deposit is a complete act and not an executory agreement. The holder of a registered instrument does not take priority (Vide *Coggan* v. *Pogose,* I. L. R., 11 C., 158). In England a purchaser for consideration without notice from the owner would

take in preference to an equitable mortgagee and though such equitable mortgagee may not be guilty of any laches or negligence. The question as to what is notice and what notice will defeat a legal mortgage is, though not altogether beyond the scope of the present enquiry a large one and I abstain from considering the same. Vide *Plumb* v. *Fluitt*, 2 Anstr. (1791) p. 432, S. C., 3 R. R., p. 605; *Birch* v. *Ellames*, 2 Anstr. (1794) p. 427, S. C. 3 R. R. p. 601 (where however it was held that the legal mortgagee had notice), *Hiern* v. *Mill*, 13 Ves. p. 104, (1806) 9 R. R. p. 149, *Whitbread* v. *Jordan*, 1 Y. and C, p. 303 (1833) S. C. 41 R. R. p. 281 at p. 291. The principle is also tacitly recognised in *Taylor* v. *Russell* (1891) 1 Ch., p. 8 at pp. 14 and 15. But in India it is submitted that would not be the correct view; a prior mortgagee with deposit of title-deeds would postpone a subsequent purchaser for value though without notice, for section 59 says that it is a mortgage and there is no reference made at all in the Act to any distinction between legal and equitable mortgages (*vide* I. L. R., 11 C., 158).

It is not necessary that there should be any writing to create the mortgage by deposit of title-deeds. If there is a writing to evidence the deposit merely it does not require any registration. For instance, when the debtor, while deposting the title-deeds and receiving a loan upon them or subsequently writes a letter or memorandum stating what he has done and the terms of the loan, such writing while admissible in evidence to prove the *facts stated,* does not constitute the contract between the parties, still less can it be said that the creditor's lien is created by the writing, for the mortgage is created by the agreement *evidenced by the loan and by the deposit.* (*Ex parte* Kensington, 2 V. and B., p. 82 (1813) 13 R. R., p. 32 at 34.) Mere deposit of title-deeds, without a single word passing operates as an equitable mortgage. The writing is only to prove the facts, *viz.,* the factum of the deposit and the factum of the loan. (Vide *Kedarnath Dutt* v. *Shamloll Khettry,* 11 B. L. R., p. 405 at pp. 411 and 414; *Jivandas Keshavji* v. *Framji Nanabhai,* 7 Bom. H. C., O. C. J., p. 45 at p. 62. *Oo Noung* v. *Moung Htoon Co.,* I. L. R., 13 C., 322. Where, however, there was no previous agreement but the equitable mortgage is created by the document itself, it has been held that the document would require registration, *Dwarkanath Mitter* v. *S. M. Sarat Kumari Dasi,* 7 B. L. R., O. C. J., 55 and *Bengal Banking Corporation* v. *Mackertich,* I. L. R., 10 C., 315).

A mortgagee in possession of title-deeds advancing further sums on the condition that he should retain the title-deeds as security for the advances, is entitled to be declared (an equitable mortgagee in respect of such advances). *Girendro Coomar Dutt* v. *Kurund Kumari Dasi,* 25 C., 611; In re *Beetham,* 18 Q. B. D., 380, Snell 10 Ed., p. 404; *Ex parte* Kensington, 2 Vesey and Beames, p. 82 (1813), 13 R. R., pp. 32 and 35; *Hiern* v. *Mill,* 13 Ves., p. 114, (1806) 9 R. R., p. 149.

Whether a mortgagee by deposit of title-deeds could by handing over the deeds to another assign over his rights to that other so that that other might be in a position to enforce the remedies of the original depositee is the next point for consideration. The Act makes no provision for it. But on principle it seems it could be so validly assigned; otherwise the object of the enactment in permitting the validity of mortgage by deposit would be defeated. The English cases favour this view and they might be looked at and followed when the Act itself is silent and does not either expressly or impliedly prohibit the same. (Robbins' Law of Mortgages, Vol. II, pp. 829 and 830). A distinction is drawn in the English cases between an assignment for consideration and assignment by way of gift. In the latter case, it will not do to have a purely oral voluntary gift and such a transaction confers no rights in the donee, *vide* Robbins, Vol. II, p. 829; *Re-Richardson, Shillito* v. *Hobson,* 30 Ch. D., p. 396). It seems that the Indian Law is also to the same effect. For an equitable mortgage of lands, &c., is an interest in immoveable property under sec. 123 a gift of immoveable property must be in writing registered and attested by at least two witnesses. If however there be a previous assignment in writing and the delivery of the deeds is subsequent in pursuance of such assignment, the assignment ought to be registered if the value of the immoveable property exceeds Rs. 100 and mere delivery gives no rights as it could not be proved, *Ganpat Pandurang* v. *Adarji Dadabhai,* I. L. R., 3 B., 312 at pp. 318, 319 and 329.

The last point in dealing with this matter is what the remedy of a mortgagee by deposit, is. Does a mortgage by deposit come under any of the classes of mortgage mentioned in section 58? The Act itself makes no provision for the remedy at any rate expressly. Nor does it in terms say to what class such mortgage belongs, Mr. Macpherson

thinks that it ought to be treated as a simple mortgage, (vide pp. 111 and 657) and that the rules applicable to a simple mortgage would be applicable to such mortgage. Mr. Shephard says (at p. 199 of his book, 3rd Edition) that the English rule may be followed and that the English rule is a suit for foreclosure or sale (citing Fisher, p. 787, 4th Edition). Fisher in paras 787 to 790 says that equitable mortgagee is entitled to both the remedies and doubts the correctness of the decision in *Pryce* v. *Barry*, L. R., 16 Eq. 153n, where it was held that he was not entitled to sale. He seems to think that if the equitable mortgagee thinks that his security is scanty he has a general right to a sale. He does not however state whether he is entitled to both the remedies at the same time as of right. There can be no doubt that there was some conflict in the English cases as regards this matter. Mr. Robbins (Vol. II, p. 995) states "It is now settled, after some difference of opinion, that an equitable mortgagee by deposit of deeds with or without memorandum, is entitled to foreclosure. In *Backhouse* v. *Charlton*, 8 Ch. D., p. 444, it was held by *Malins*, V. C., that the remedy was foreclosure and not sale. But in the case of *York Union Banking Co.* v. *Artley*, 11 Ch. D., 205., it was held by *Jessel*, M. R. that the equitable mortgagee is entitled to either sale or foreclosure." Under the Indian Act, section 67, a mortgagee is entitled "to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem..., or an order that the property be sold," *i.e.*, foreclosure or sale. The latter part of the section makes an exception and states a simple mortgagee is not entitled to bring a suit for foreclosure, a mortgagee by conditional sale is not entitled to bring a suit for sale while the usufructuary mortgage is not entitled to foreclosure or sale. But no proviso is made as regards the equitable mortgage. As under section 59 he is a mortgagor, the language of the section seems to give the equitable mortgagee a right to sue for foreclosure or sale (vide *Lukshmeshar Singh* v. *Dookh Mochan Jha*, I. L. R., 24 C., 677 at p. 680. If this construction be right then the limitation would be 60 years (*Ramachandra Rayaguru* v. *Modhu Padhi*, I. L. R., 21 M., p. 326) under Art. 147 of the Limitation Act. This has been so expressly decided in *Manekji Framji* v. *Rustomji Naserwanji Mistry*, I. L. R., 14 B., p. 269. *Jardine*, J. holds limitation in such cases to be 60 years without deciding whether equitable mortgagee is entitled to sue for foreclosure only, but *Parsons*, J.

holds his remedy to be foreclosure or sale. Upon the latter view the Limitation would be 60 years even according to the decision of the Full Bench in 21 M., p. 326. But if he is only entitled to foreclosure only or sale only then the decision of the Bombay High Court could not be accepted in view of the said Full Bench decision of the Madras High Court. In *Srinath Roy* v. *Godadhur Das*, I. L. R., 24 C., p. 348, Mr. Justice *Jenkins* stated that the practice of the Calcutta Court had been to decree a sale only and he made a decree in that form only. Beyond the statement as to the practice, the Court did not go into the soundness or otherwise of the practice nor did it enter upon a consideration of the question whether he is entitled in one suit to ask for foreclosure or sale.

P. R. GANAPATI AIYAR.

VISVARUPA'S COMMENTRY ON YAJNAVALKYA.—(*Contd.*)

19. **The krita is one sold by them. The kritrima is a son adopted by a man himself. The svayamdatta is one who gives himself. The sahodhaja is one accepted while yet in the womb."** [1]

The krita is one sold for price by his father and mother who have power to do so and is known as the krita son of the purchaser. The particle 'tu' is used to indicate the want of power in the mother, by parity of reasoning in the case of the adopted son (*a*). A kritrima is one who, being destitute of father and mother, is accepted as a son. The son self-given also is one of the same description, who gives himself. These sons, the dattaka and the rest, should be known to be equal, according to another Smriti. Sahodhaja is the son of a woman married while he was in her womb, and he should be considered to be the son of the husband and to belong to his mother's caste.

20. **"The son deserted for any cause by the father and mother and is taken as a son is the apaviddha."** [2]

The meaning is that he is known as apaviddha (deserted son).

21. **"Of these, the one succeeding, in default of all preceding, gives the pinda and takes the wealth."** [3]

It should be understood, that of the aurasa and other sons mentioned in their order, the succeeding one, in default of the

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[1] Yajnavalkya II. 132. [2] *Ibid* II. 132. [3] *Ibid* II. 131.

(*a*) According to the Mitakshara the son bought is one who is sold by the father and mother *or by either of them*. But according to this commentator, the mother has no power to sell the son.

preceding, offers the pinda and takes the wealth; when the preceding is alive, the succeeding one should be given maintenance only, as a matter of charity. Likewise, the text of Manu regarding the aurasa: "One alone, the aurasa, is the heir to the father's property; but out of charity, he shall give maintenance to the rest," is illustratively used of all sons, kshetraja, etc. The meaning is that he alone who, being the first, is the heir, takes the entire patrimony, and that he should give to the rest maintenance only, out of charity. As for the special mention of the kshetraja while the aurasa is alive, in the text: "Let an aurasa dividing the paternal wealth, allot to the kshetraja a sixth or a fifth," which is repeated: "The aurasa and the kshetraja sons are the sharers of the patrimony. The remaining ten sons are, in order, the takers of the gotra and of the wealth," the kshetraja here intended is the son of the appointed daughter. If it is asked is he not equal to the aurasa, we say true; and it has been laid down by himself "they are the sharers of the patrimony." Then how is it stated "a fifth or a sixth"; that applies to the property of the father. He being equal to the aurasa son of the maternal grandfather, deserves to take his entire wealth. But he is lost to the father, because he is begotten for another's benefit; and the text of Vasishtha: "The appointed daughter is the third" intends the same. As the appointed daughter is given by her father to another as the soil for raising offspring, the son begotten on her can be called his 'kshetraja' son. He is called the kshetraja son of the begetter also, because of his connection as the purifier of the soil. His equality with the aurasa son in the taking of the father's wealth regards his maternal grandfather; but his inequality in taking shares regards the father. Thus there is no inconsistency. The (allotment of) one-fifth and one-sixth shares is at the option of the aurasa (*a*). In other places also, the option in the allotment of unequal shares should be thus understood. Therefore it is settled that in default of the preceding, the succeeding one takes the wealth. As for the text of Sváyambhuva Manu: "The aurasa, the kshetraja likewise, the dattaka, the kritrima likewise, the gudhotpanna, and the apaviddha, are the six heirs and bandhus. The kánína, the sahodha,

(*a*) According to the Mitakshara the mother is not left to the option of the *aurasa*. The allotment of a fifth or sixth shares depends on the possession of good qualities by the Kshetraja.

the kríta, the paunarbhava, the svayamdatta, and the son by a Sudra woman, these six are kinsmen but not heirs," what is its meaning? The meaning is that the five sons beginning with the kshetraja take shares even when the aurasa is alive; but the kanina and the rest take shares only in default of the preceding. This explains the text of Vasishtha. Likewise Sankha says: "Two shares belong to the father, two to the aurasa, three to the kshetraja and the son of the appointed daughter; and one to each of the rest." Three shares to the kshetraja and the putrikáputra, *i.e.*, a share and a half each. From shares being allotted to the father also, it is inferred that these take shares even though the aurasa is alive, only during the father's lifetime. After him, they have a right to share only in default of the preceding heirs, as laid down in the text of Achárya (Yájnavalkya). As for the other rule regarding the order of succession, that should be understood to refer to the option of the father. But where it is not applicable, the order laid down by Yájnavalkya is the proper one. In this manner also should be explained other texts of a similar kind.

22. To show that all these sons beginning from the dattaka, are of the same caste, he says:

"This rule has been propounded by me in regard to sons equal in caste. Even a son begotten by a Sudra on a female slave takes a share at his option." [1]

Having stated 'this rule has been propounded by me (in regard to sons equal in caste)', Yájnavalkya shows that the texts of other Smritis are useful as being applicable to a different subject. That has been already commented upon (in this way): This order of succession to the property applies only after the decease of the father; but where the father is alive, the rule of partition laid down in other Smritis only should be followed (*a*).

23. This he explains. This is the law of partition applicable after the father's death and is explained by us, because it is difficult. He shows the needlessness of explaining the law of partition during the lifetime of the father by the text: "Even a son begotten by a Sudra on a female slave takes a share at the option of

[1]. Yájnavalkya II. 133.

(*a*) Compare Mitakshara Chap. I., Sec. XIII., para. 1. The latter half of the verse is there introduced as laying down a special rule regarding the partition of a Sudra's wealth.

the father" and by the use of the expression 'at the option of the father.'

"After the father is dead, let the brothers make him partaker of half a share. If brotherless he shall take the whole, provided there are no daughters' sons." [1]

The term 'half' is to denote a less share. Likewise Brihaspati: "They shall give, after the death of the father, to the brother born of a Sudra concubine some trifle, if he is obedient." Here also the text is intended to refer to one acting in violation of the Sastras.

If he has no brother and if there exist neither daughter nor her sons, he shall take the whole, with the king's consent; for a text of Brihaspati says: "All the property of an heirless person devolves on the king; some hold that it goes to the son of the concubine with his consent." From this very text 'in default of daughter's sons' (it is clear) that the daughter's sons are the heirs even to men of the regenerate classes, in default of sons; this alone is the reason for the rule enjoining the performance of the maternal grandfather's sraddha (*a*).

24. Thus has been declared a special rule regarding the son by a Sudra woman.

Generally, however:

"The wife, the daughters also, the parents, brothers likewise and their sons, gotrajas, bandhus, the disciples and the fellow-student; of these, on failure of the first, the next in order is the heir to the estate of one who departed for heaven leaving no issue. This rule extends to all classes." [2]

Here by 'wife' is intended one who is pregnant(*b*). Accordingly also Vasishtha: "Now, partition among brothers to be postponed until childless wives beget sons." This shows that pregnant women deserve shares. This word 'son' means 'the infant in the womb,' because of the use of the term 'childless.' Though the infant born be a female, she is like the appointed daughter. Accordingly,

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1. Yâjnavalkya II. 134. 2. *Ibid* II. 135 and 136.

(*a*) To bring in the daughter's son as heir after the daughter, the Mitakshara says that the daughter's son is included in the particle 'also' in verse 136, Chap. II. Yajnavalkya; *vide* Chap. II., Sec. II., para. 6.

(*b*) According to the Mitakshara, the wife (*Patni*) succeeds to the inheritance whether she be pregnant or not at her husband's death; *vide* Mitakshara, Chap. II., Sec. I., para. 39.

Gautama also after saying "or the widow of a childless man," adds: "Or let her wish for the seed." From this, the word 'woman' is indicated to mean a pregnant woman. Daughters] appointed daughters only(a). Likewise the text of Sváyambhuva Manu also intends the appointed daughter alone: "As is one's self, so is one's son; the daughter is equal to the son; how then can another take the wealth, when she, who is his own Atman, lives." She is heir in default of sons, because she could produce a son.

The plural (in 'daughters') is to indicate plurality of appointed daughters. The particle 'cha' implies joint connection with wealth at option. The particle 'eva' is to indicate certainty in all places. 'Parents' *i.e.*, mother and father. The mention together of these, because of joint ownership is to indicate that they shall take one by one; although she is referred to by a conjunctive compound, the mother has priority; for it is declared: "The mother shall take the wealth of her childless son; if she also be dead, the paternal grandmother takes the wealth." When one has no issue of any kind, he is called issueless. This alone is its meaning. But if it be urged that there is this text: "The father or the brothers shall take the wealth of a childless person," (we say) that should be understood to apply only where the mother is not alive. How is this text of Sankha (to be explained?): "The property of a childless person deceased, goes to the brothers; in their default, the parents shall take; or the eldest wife." That applies to the uterine brother where the wife and daughter answering to the above description do not exist. In their default, the parents shall take; here, the father takes first, because of the text: "the father shall take the wealth of an issueless man." With his consent, his wife may take. If he does not consent, the eldest wife may take. The term 'eldest' is used in the sense of 'equal in caste.' The particle *va* denotes 'if she is of the same caste.' By this is explained the following also: "If one of the brothers dies childless or enters into another order, his brothers shall divide his wealth, excepting stridhana." The purport of this is that the paternal grandmother takes the wealth of sons among Kshatriyas, etc., in default of their father and mother. Brothers likewise]

(a) According to the Mitakshara it is not appointed daughters only that succeed. Mitakshara Chap. II., Sec. II.

here, 'likewise' indicates manner. 'Brothers' includes all brothers born of co-wives, etc. 'Their sons' (should be understood) as reviously explained. Gotrajas] sapindas, samanodakas and persons connected with the same person or rishi, in their order. Bandhu], maternal uncle, etc. The preceptor, even though not expressly mentioned, is also included, as he is eulogised as a father. Disciple] one whose upanayana has been performed (by him). Fellow-student] one whose upanayana was performed by the same preceptor. Of these, in default of the preceding, the succeeding one takes. The rest is clear.

25. Till now were declared rules of partition having reference to castes. Hereafter are stated rules regarding different orders:

"The heirs to the wealth of a hermit, an ascetic, and a permanent student are, in order, the preceptor, the virtuous disciple, and the brother-in-holiness and fellow-student." [1]

Brahmachari] the permanent student is intended. [Brother-in-holiness] one who is related through the same preceptor. Ekatirthi] one who belongs to the same order. The rest is clear. To others in all castes than the Brahmacharin, hermit and ascetic, it should be understood that the rules of partition previously laid down apply by the principle of elimination.

26. **"A reunited brother shall keep the wealth of a reunited brother, and a uterine brother, of a uterine brother; and shall give it away to one subsequently born."** [2]

He is termed reunited who, being separated, again mixes his wealth and lives together with his father or brother, from any reason. If, while the father and the sons are thus living together, the father begets a son, he should also be given a share. If he dies, it should be taken. "The reunited brother, of the reunited brother"; this applies where partition is made according to the mothers, and refers to the after-born son where the father has no property. As for the text of Gautama: "Now, partition among reunited brothers. The property of all deceased reunited parceners goes to the eldest," here by 'the eldest' is certainly meant the father. The father succeeds to the property of his deceased sons who have no uterine brothers and are not reunited with any other brother. That has been laid down in the text:

[1] Yajnavalkya II. 137.   [2] *Ibid* II. 138.

"The father takes the wealth of an issueless person." Others take 'eldest' to mean 'the eldest of the brothers.' That deserves to be thought over. The rest is clear. Others here read the following verse taking it to be merely explanatory of the previous text: "The reunited brother and not a half-brother not reunited, shall take the wealth of a half-brother; a uterine brother even if not reunited shall take, and not a half-brother reunited." The half-brother, even though reunited, does not take the wealth, while the uterine brother is alive. The meaning is that the uterine brother, though not reunited, takes the wealth(*a*).

27. The brothers and their sons of the following description should be supported by him alone who takes the wealth.

"The outcast, his son, the impotent, the lame, the madman, the idiot, the blind and one afflicted with incurable diseases, etc., these should be maintained, excluding them however from participation." [1]

'His son' certainly denotes the son of the outcast. Madman] one possessed by a devil. Idiot] one always deficient in understanding. One afflicted with incurable diseases] one suffering from irremediably bad diseases, such as leprosy, etc. The particle 'cha' includes the deaf, etc., mentioned in other Smritis. Some say that the mention of the lame, etc., is to illustrate all those who are disqualified to perform agnihotra, etc. That is unsound, for wealth is an object of human endeavour and as even the unlearned, who are not qualified (to perform agnihotra) are yet declared worthy of property; as Gautama says: "The learned parcener need not give to the unlearned, property acquired by him (by learning)" and "the unlearned shall divide equally." Therefore the disinherison of these results only from express prohibition and not from their being disqualified (to perform agnihotra, etc.,) or from their possessing visible indications of heinous sins committed in previous births. The blind and the rest, who are not outcasts, however, have a right to the grandfather's estate. Such is the custom. From the necessary incompetency to receive more than the wealth necessary for their maintenance, this should be understood to be a mere declaration of

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[1] Yajnavalkya II. 140.

(*a*) According to this commentator, verse 139, Chap. II. of Yajnavalkya is apparently not authentic. But the Mitakshara contains a learned commentary on it, Vide Mit. Chap. II., Sec. IX., paras. 7—13,

By the mention of the husband alone, it is inferred that others such as brothers, should repay (her the property), even though it was taken by them during famine, etc. Duress] obstruction by saying 'you shall not go without paying me now'; some say that it means siege. The rest is clear.

35. Further:

"Let one give to the superseded wife an equal sum for the supersession, provided no stridhana had been given her; but if given, let him allot a half."[2]

To a wife over whom a second marriage is contracted, so much money as is equal to that expended on the (second) marriage should be given, if no stridhana had been previously given her. But if it had been given, a half should be given. This should be understood to apply to a wife superseded without a proper cause for supersession. Thus the law of partition has been explained.

36. If one subsequently contests the partition saying 'I am unseparated' then what is to be done? Yájnavalkya says:

"When the fact of partition is denied, it should be ascertained by the evidence of kinsmen, relatives, documents, separate acceptance of gifts and by houses and lands separately enjoyed."[3]

When the fact of partition is doubted, it should be established by (the evidence of) gnatis, etc., Gnati] the maternal uncle, etc., Bandhu] the paternal uncle's son and the like; for these are generally middlemen present at the partition; or other witnesses. Document] deed which was executed as evidence of partition. That is laid down by Brihaspati: "A document may be executed by brothers making a partition; or respectable witnesses may be secured by those making a partition to avoid disputes." Or they may attest other transactions in indirect evidence of partition; similarly by separate acceptance of gift and separate enjoyment of house and lands. A'deya] acceptance of gift. 'Separate enjoyment of house and land' means taking separate land, house, &c.

Likewise Nárada: "Separated, not unseparated brothers, may reciprocally bear testimony, stand surety, bestow gifts and accept presents." Thus the separate enjoyment of lands, etc., is stated to be a fact removing doubts about partition.

S. SITARAMA SASTRI.

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[1] Yajnavalkya II. 147. [2] *Ibid* II. 148. [3] *Ibid* II. 149.

NOTES OF INDIAN CASES.

Yad Ram *v.* **Umrao Singh**, I. L. R., 21 A., 380. The question o benamidar's right of suit is becoming a source of considerable diversity of opinion. The Allahabad and Bombay decisions are in favour of the benamidar suing. The Calcutta High Court is divided, there being decisions both ways. We do not think the decision of the Madras High Court in *Shangara* v. *Krishnan*, I.L.R., 15 M., 267, can be construed to favour the Allahabad and Bombay views. All that was decided in that case was that where the benamidar had sued without objection, the decree in that action estopped the beneficial owner from re-agitating the question either on the principle of representation, or on the ground that he had been put forward, the real owner standing by, as the right person to sue. It seems right to hold, that the real owner should not have a second opportunity of agitating the same matter in a fresh action. But this does not involve, to our mind, the proposition that if in the prior action the defendant resisted it on the ground of "*no title*" in the plaintiff, the court should permit the plaintiff to go on regardless of the objection. In this connection, we may draw attention to an article by Mr. Monnier in Vol. VI, M. L. J., 405. We took occasion to doubt the correctness of Mr. Monnier's view which was that the benamidar was in the position of a trustee for the real owner. It seems to us that the right principle has been recently indicated in a Madras case which was an action for enforcement of a contract in which the defendant raised the objection that the plaintiff was not entitled to sue, because some other persons were also interested in the contract. In actions upon contract, the obligor, it seems to us, is not competent to give evidence that the obligee named is not entitled to enforce the obligation but that some other person is. See *Adaikkalam Chetti* v. *Marimuthu*, I. L. R., 22 M., 326. It stands to reason where the obligee is a benamidar, the obligor is likewise incompetent to show that somebody else was entitled to the benefit of the obligation. But it seems to us if the action is not for the enforcement of any contract, but one where title to property is in issue, as between a benamidar and a stranger, it is competent to that stranger to question the title of the benamidar and the action of the benamidar must fail. The same principles will apply if the question arose between transferor and transferee as between obligor and obligee.

Ram Dayal *v.* **Madan Mohan Lal**, I. L. R., 21 A., 425. The question raised in this case is one which we discussed in the critical note on *Ramabhadra* v. *Jagannatha*, I. L. R., 14 M., 78, vide 1 M. L. J., 213.

The conclusion that we came to is in accord with the opinion expressed by the Full Bench of the Allahabad High Court. Because the decree is silent as regards future mesne profits as to which the plaintiff has no cause of action at the date of suit, though he has asked for them, the explanation to S. 13 cannot convert the silence into an adjudication adverse to the plaintiff so as to bar a suit for subsequent mesne profits. We pointed out that the Madras case was hardly intelligible and Chief Justice *Strachey* expresses the same opinion.

Harlal v. Muhamudi, I. L. R., 21 A., 454. The ruling of the Bombay High Court in *Virchand Lalchand* v. *Kumaji*, I. L. R., 18 B., p. 48, is accepted and the Madras case *Natesan Chetti* v. *Soundararaja Ayyangar*, I. L. R., 21 M., 141, dissented from by the Allahabad High Court. The language of Art. 111 seems rather to point in favour of the Madras view though principle and analogy make strongly in favour of the Allahabad view. A good deal has been said in support of that view and we are disposed to welcome it notwithstanding the difficulty of making the language suit the interpretation.

Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma, I. L. R., 21 A., 460. We have had frequent occasion to complain of somewhat unsatisfactory character of the pronouncements of the Judicial Committee in dealing with Indian appeals. It does seem to us, and we say it with all respect, that the retired Anglo-Indian element which is distinctly inferior to the rest of the constitution of the Committee has had a preponderating voice in the shaping of the decisions of that body by reason of the greater authority naturally conceded to supposed special knowledge. We have often wished in recent years for a change in the constitution of the Board so as to relegate the retired Indian Chief Justices to the mere position of assessors occupied by their predecessers of half. a century ago when they advised the Judicial Committee on all Indian appeals and the Committee delivered their own judgments untrammelled by the authority of the assessors. We look back to the judgments of those days of men like Knight Bruce, Turner, Westbury and Cairns with great satisfaction as models of judicial reasoning and expression. The latter day judgments of that august tribunal have not sustained the ancient reputation. It is, therefore, with a feeling of relief that we took up this masterly judgment of Lord Hobhouse. We cannot regard the conclusion arrived at as otherwise than satisfactory and a vexed question has been satisfactorily solved.

SUMMARY OF RECENT CASES.

Mortgage—Competition between equitable mortgagee and subsequent purchaser for value without notice—Negligence in not calling for production of title-deeds.

Oliver v. Hinton [1899], 2 Ch., 264, C. A.

An agent for purchase of certain properties obtained a conveyance without notice of the existence of a mortgage by deposit of title-deeds. He asked for the title-deeds, but on being told that, as they related to other lands of the vendor they could not be delivered, the agent did not ask to see the documents, but was content with a stipulation in the conveyance, that copies of the deeds should be allowed to be taken, and that the deeds themselves should remain in the custody of the vendor and be produced whenever the vendee should call for them. The question was whether under these circumstances the mortgagee was entitled to priority over the purchaser.

Romer J. held that the purchaser had been grossly negligent in not calling for the production of the documents and that he could not allow the plaintiff's contention that under the circumstances even if he had called for the title-deeds the vendor would have given some false answer which would have excused the defendants from making any further inquiry concerning them.

On appeal it was contended for the appellants that the Judge having found that they had no *actual* notice of the mortgage should not have decided against them in the absence of fraud or any negligence on their part so gross as to justify an inference of fraud. The Court of Appeal consisting of *Lindley*, M. R., *Sir F. H. Jeune*, P., and *Rigby*, L. J., overruled this contention and held that the observations of *James*, L. J., in *Ratcliffe* v. *Barnard*, L. R., 6 Ch., 652, which seemed to support such a contention were rather widely expressed, and that all that was necessary to deprive the *bona fide* purchaser for value of his priority was to show that he had been guilty of such gross negligence as would make it inequitable to deprive the prior incumbrancer of his priority.

Parties—Parish Council—Suit to establish right of Inhabitants.

Stoke Parish Council v. Price [1899], 2 Ch., 277.

The Attorney-General is a necessary party to a suit brought by a Parish Council to establish the right of the parishioners to the use of a

well or spring of water. Where such suit is brought by the Council without making him a party, the suit should be dismissed.

Lease—Construction—Falsa Demonstratio—Clear mistake.

Cowen v. Truefitt [1899], 2 Ch., 309, C. A.

The doctrine of '*falsa demonstratio*' does not apply to a case of misdescription in which from the other circumstances it is clear what the parties really intended to convey. It applies where a description consists of two parts, the one true and the other false,—no matter which comes first and which last—and the part which is true indicates the subject with sufficient certainty. Then the part which is false is according to the doctrine rejected as surplusage. The peculiarity of such cases is that the true portion is unequivocal and applies to only one subject and the false portion is applicable to no subject.

In this case the lessee of the upper storeys of two houses Nos. 13 and 14 was allowed by the lease the use of the stairs of house No. 13. But as a fact there was no staircase in No. 13 and from the date of the lease, the lessee was using the back stairs of No. 14. It was held that the case was not one to which the maxim "*Falsa Demonstratio non nocet*" applied but that the intention of the parties being clear the document should be rectified so as to allow the lessee the use of the stairs of house 14 which he had till then been using.

Vendor and Purchaser—Leasehold—Lessor's consent—Default of vendor in obtaining consent—Damages, measure of.

Day v. Singleton [1899], 2 Ch., 320, C. A.

The question in this case was whether a purchaser of leasehold property which the lessee could not sell without the permission of his lessor was entitled to claim over and above the return of his deposit with interest and expenses, any damages for the loss of bargain brought about by the vendor's omission to do his best to procure the lessor's permission. In this case the vendor died and his representatives in order to get rid of the action upon the agreement to sell, procured the lessor to refuse his consent. The purchaser then amended the action by claiming damages for the loss of his bargain.

In the first court *Romer*, J., considered the case as falling within the rule in *Bain* v. *Fothergill*, L. R. 7, H. L. 207, and gave judgment to the plaintiff for the amount of his deposit and interest and the expenses incurred in expectation of the sale.

On appeal *Lindley*, M. R. and *Sir F. H. Jeune*, P., in reversal of judgment held that the rule in L. R. 7 House of Lords was applicable only when the sale went off without the vendor's default, and that when the vendor can procure assent but will not, he is liable not only for damages to the extent of the return of deposit interest and expenses but also for the damages in respect of the loss of bargain.

Mortgage—Further charge—Joint mortgagees—Notice to one of the existence of intermediate charge—Tacking.

Freeman v. Laing [1899], 2 Ch., 355.

In this case certain properties were originally mortgaged to three persons jointly, and subsequently a further charge was created in favour of the same persons. But between the date of the mortgage and that of the further charge, another mortgage upon the same properties had been created to secure an advance by a third person, of which mortgage one of the three joint mortgagees was aware having acted as solicitor to one of the parties. The question was whether the joint mortgagees, all or any of them were entitled to tack the amount of the further charge or any portion of it to the first mortgage and recover in preference to the intermediate mortgage. It was held by *Byrne*, J., that the joint mortgagees could not be said to have each a right to any specific portion of the mortgage money and that the notice of the intermediate mortgage to *one* of the joint mortgagees was enough to prevent the right of tacking and postpone the whole of the further charge to the equitable mortgage.

Secret underground Trespass—Fraud—Limitation—Champerty.

Bulli Coal Mining Company v. Osborne [1899], A. C. 351, P. C.

This was an appeal from the Chief Court of New South Wales. Two important questions arose in this case, (1) whether, when between the years 1878 and 1880 the appellants wilfully and secretly trespassed upon the respondents' mines and removed some coal therefrom and the lessees of the latter under a lease of 1893 for the first time discovered the underground trespass, a suit by the respondents in 1895 for the recovery of the value of coal abstracted from their mines was barred by the statute of Limitations; and (2) whether an agreement between the respondents and their lessees by which it was stipulated that the lessees should bear the expenses of the litigation and receive 92½ per cent. of the profits, in any way affected the respondents' right to recover the profits.

The Chief Judge of the Court of Equity before whom the case was tried in the first instance held on the first point that the statute of Limitations did not bar the suit, and on the second, that the agreement between the lessors and the lessees, though champertous, did not stand in the way of the respondents recovering in the suit, but that the costs should be disallowed as the result of allowing them would be to give effect to the champertous agreement.

On appeal the Chief Court of New South Wales affirmed the judgment except as to costs which they were disposed to allow. They observed that at the time of the lease in 1893, both the lessors and the lessees were under the mistaken impression that the mines were in a state of nature, that therefore if the lessees had chosen they might as soon as they discovered that the mines had been worked in part, have got the lease cancelled on the ground of mutual mistake, and that under the circumstances, there was nothing wrong either in law or in equity in allowing the lessees to take a share of the profits which would have been rightfully theirs if the coal had not been removed. They therefore held that the agreement was not champertous and allowed the respondents' appeal as to costs. From this was preferred the present appeal to the Privy Council.

In the appeal the point as to the champertous nature of the agreement was not pressed and the Privy Council intimated that they saw no reason to differ from the opinion of the Chief Court. On the point of limitation it was urged for the appellants that the Statute of Limitations applied as much to Courts of Equity as to those of law and that mere fraud and wilful trespass would not furnish an answer to a plea of statute unless there was further proof that the trespassers actively concealed the trespass from the person defrauded. The Committee, on a consideration of all the authorities, held that though the Courts of Equity were said to be within 'the spirit and meaning' of the Statute and had uniformly adopted its rules as supplying them with a convenient standard of due diligence which they always required of their suitors as a condition of relief, they never allowed the plea of statute in cases of concealed fraud so long as the person defrauded was ignorant of it without any fault of his own.

Criminal Jurisdiction—Procedure—Supreme Court at Gibraltar—Morocco Court—Trial by Jury.

Spilsbury v. Regina [1899], A. C., 382, P. C.

In a criminal case in which both the Consular Court of Morocco and the Supreme Court of Gibraltar had jurisdiction, the Court of the

Queen's Bench arrested the prisoner in London and sent him to Gibraltar to be tried by the Supreme Court there. The question was whether as incident to this order directing his trial at Gibraltar, the trial of the prisoner was to be conducted in accordance with the procedure governing the Supreme Court of Gibraltar.

The Supreme Court was of opinion that the procedure should be that prescribed by the Morocco Order in Council and that therefore the prisoner should be tried not by a jury as required by the rules of Gibraltar but by the judge with or without assessors as required by the Morocco Order in Council.

On appeal to the Privy Council the order of the Supreme Court was sought to be supported on the ground that the jurisdiction of the Gibraltar Court arose under Sections 4, 11 and 19 of the Morocco Order and that the jurisdiction so conferred upon it should be exercised not in accordance with the Gibraltar Order which did not create the jurisdiction, but in accordance with the Morocco Order in Council. The Committee held that unless there was some order expressly prohibiting the court from doing so, the ordinary rule that the person to be tried for a criminal offence should be tried according to the procedure of the court in which he is tried, should prevail and that there being no such express prohibition in this case, the prisoner should be tried by a judge with a jury.

Bond—Construction—Recital.

Australasian Joint Stock Bank *v.* Bailey [1899], A. C., 396, P. C.

In 1887 the respondents and others interested in a certain association gave a continuing guarantee for over-drafts by them to the extent of £ 2,500, interest and charges. Two years later the respondents again, with others gave a joint and several bond in the penal sum of £ 4,000 providing that the bond should become void if the association or their sureties paid the amount due on the current account and that the liability of the sureties should not extend to more than £ 2,000 interest and costs. The terms of the condition and the phrases used, such as "all moneys whatsoever," "in any manner whatsoever become indebted," etc., showed that the bond was intended to secure not merely the money advanced in excess of the amount secured by the guarantee, but all moneys whatsoever advanced by the bank. It was, however, contended that though the terms of the condition were thus widely expressed, the recital clearly indicated that their intention was

to limit it to the balance of debt after deducting the amount guaranteed. The recital was to the effect that the association "*in addition to the sum of* £ 2,500 *interest and charges secured by the guarantee* are desirous of obtaining advances" and that in order to persuade the association to make the advances "it has been agreed that all the debts, interest and liabilities *thence* to arise shall be secured by the above written bond."

In reversal of the decision of the majority of judges of the Supreme Court of New South Wales, the Privy Council held that there was nothing in the recital so inconsistent with the rest of the document as to make it clear that the condition of the bond must be taken in a qualified sense, and that the bond was intended to and did secure all moneys due on the account current to be made up from the books of the bank.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications:—

The Law Students Journal for December 1899, (*in exchange*).
The Law Students Helper for December 1899, (*in exchange*).
The Lawyer, (*in exchange*).
Sind Sadar Court Reports, Vol. 1., No. 5 (*in exchange*).
The Bombay Law Reporter for December (*in exchange*).
The Albany Law Journal for December (*in exchange*).
The Calcutta Weekly Notes for December (*in exchange*).
The Allahabad Weekly Notes for December (*in exchange*).
The Green Bag for December (*in exchange*).
The Canadian Law Times for December (*in exchange*).
The Educational Review for December (*in exchange*).
The Canada Law Journal for December (*in exchange*).
The Kathiawar Law Reports for December (*in exchange*).

The New Year Honors:—Madras never used to occupy a prominent place in the Honors' Gazette; and even where Madras was honored, the Native Community very rarely came in for an adequate share. Madras has been singularly lucky this year in two of her worthiest sons being selected by Her Majesty, The Queen Empress, for special distinction. No more conspicuous names could be conceived in this Presidency than those of Sir S. Subrahmanya Aiyar and of Sir V. Bhashyam Aiyangar. The one has already achieved by his judicial labours a reputation second

to that of no other judge in the land. By his learning, his character, his large heart and philanthropy he has won the admiration of the profession and the public. The other has by his singularly subtle intellect and legal astuteness carved out a position for himself unique in the history of the profession in this Presidency. The honor conferred upon him is an honor to the profession to which he belongs, specially to that branch of it which by his unexampled success he has raised greatly in public esteem. We trust that the recipients of these honors may live long to enjoy them and the confidence and esteem of the community of which they are ornaments.

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*Court Room Oratory.**—Before the speaker of this occasion has proceeded very far with the address of this occasion, it will have been quite clearly revealed to you that what he knows about oratory must have been derived from history and observation and that it is at best in a very slight degree due to experience. Indeed, to the observations of your speaker in times past are due the few suggestions which, in the form of recommendation, will be submitted for the consideration of the younger members of the profession especially; for your speaker feels safe in assuming that the veterans in this service, those who constitute the "Old Guard," those whose oratorical habits are confirmed, are "past all surgery."

You are not to infer from the title of what promises to be a rambling talk this afternoon, that there is a species of oratory peculiar to the court-room. The oratory which is successful in the pulpit, upon the platform, and in the legislative hall, is very likely to be successful in the court-room. That is, with slight qualifications, there is but one kind of oratory. The speaker, who can stir your hearts, who can convince your judgments, who can make you accept, adopt and act upon his view of the subject under discussion, is an orator. The speaker who can simply entertain and amuse you by his eloquence may be an accomplished and pleasing declaimer, but he is no orator.

To illustrate the fact that pulpit oratory would be effective in the court-room, and court-room oratory would be effective in the pulpit, I may cite the case of a distinguished divine of the city of Baltimore; distinguished for his consecrated service in the cause of the Master; distinguished for his eloquence in the pulpit. He had been theretofore

* Extemporaneous address by Hon. S. N. Owen before the State Bar Association of Ohio.

for a number of years a successive practitioner of the law, celebrated for his court-room oratory. He was frequently accustomed to allude to the court-room as a very valuable oratorical training school for him. On one occasion, becoming enthusiastic with the subject, he said to his congregation: "You, my brethren, are my jury; my Lord and Master is my client; I feel that His cause is just; and I ask you to hear me patiently in what I have to say in defence and support of that cause; and when I shall have concluded, I shall surely expect your unanimous verdict."

An introduction to an argument is an absurdity. If the so-called or intended introduction deals with the subject of the argument, it is a part of it. If it does not so deal with the subject of discussion, it had better be passed by altogether. It is painful many times to see a fairly good lawyer and reasonably pleasant speaker exhaust himself, if not the court and jury, upon an introduction—what he conceives to be an introduction—in which he proclaims what he is going to talk about after a while; leaving himself very much in the condition, to use a familiar illustration, of one of those Mississippi river steamboats, those flat-bottomed, stern-wheel contrivances. It is said of them that they are nearly all whistle, and when they are about to depart from a port, they give out a blast that arouses the echoes from the woods, the fields and the shores—proclaiming that they are about to start! They tell us that the consequence is that it takes so much steam to run the whistle that there isn't enough left to run the boat! (Laughter.)

There is no more important part of an argument in the court-room than the statement of the case. The advocate succeeds best who in the statement of his case impresses the court and the jury with the justice of his cause;. that imparts to the court and jury an impression that somehow he ought to win that case. The first thing a wise lawyer will do as an advocate is to see that an impression like that gains firm lodgment in the breasts of the triers. You should know that the judge is almost universally training his thoughts in a line that leads to just results.

But, it may be suggested, suppose you are defending against that sort of a case, then what? Well, if you expect to prevail against a case that has inherent justice, equity and merit behind it, it must be by reason of some over-mastering principle of law; and so the wise thing to do is to impress upon the court early the strength of that legal proposition upon which the defence must rest.

It has been well said that a case well stated is half tried. It would not be wholly inaccurate to say that a case well stated is half won.

Avoid chronology in the statement of the facts of the case. By that is meant that a methodical and orderly statement of the facts, in the order of their occurrence, leading up to their controversy, is a systematic waste of time, in the absence, of course, of a preliminary statement of the legal propositions involved in the controversy, and underlying the facts which are stated. For instance: "If the court please, the question in this case is: 'Can a personal representative bind his estate by giving a promissory note, in his representative name and capacity?' We say that he cannot so bind the estate. Our adversaries maintain that he can." Or, "The question in this case is; 'Can a debtor, or does a debtor, by giving his note to his creditor for the amount of his account, pay and satisfy that account?' We say that he does not, without an express agreement to that effect; our adversary maintains, that the giving of a note under such circumstances pays, satisfies, discharges, and for ever extinguishes the account, and the account thereafter has no existence. That is the question."

Having made a brief, clear statement of the question involved, you may safely reveal in chronology; because then the mind of the judge is trained upon the vital question and he is applying to it the facts which you state to him; otherwise, such a statement of the facts of the case is as instructive, as interesting, and just about as entertaining as the exposed extremity of a telephonic interview. (Applause.)

Avoid in your argument all attempt at witticism. If there is one serious suggestion in the impending address, it is right here—avoid every attempt at witticism. Crack no jokes; tell no funny stories in the argument of the case to court or jury. You will by your fun and levity undoubtedly entertain the jury—possibly the court; but that is not what you are there for. By your brilliant flashes of wit, and by your delightful humor, and by your really good stories—and they are the dangerous ones—you will excite an expectation in the jury for more fun after a while, and they will be impatiently waiting for something funnier still further on; while it is to the doubtful questions, the questions that need clearing up, that you should address yourself; and you should by your own seriousness impress the jury that to you and to your client that case is a matter of grave and serious concern.

The lawyer who achieves a reputation for being a funny man is doomed, so far as his advocacy is concerned; just like the sensational preacher is doomed when he has achieved the reputation of being sensational. He may build up congregations, but he will never build up churches—never did. You may win the applause and secure the verdict.

of that unsworn jury that sits without the bar; but when that sworn jury retires to the jury-room to consider your case, it will be the weightier matters and not the "mint, anise and cummin" of the case that will engage their thought.

History, perhaps, Mr. President, affords no better illustration of this subject than the case of the two rival orators of Greece in the palmy days of Grecian oratory. You will remember—some of you may have forgotten—that Philip of Macedon succeeded in making it very uncomfortable for the Greeks by cutting off access to their ports of entry, and other annoyances. This gave rise to two parties. One was in favor of making peace with Philip, and the leader of this party was that most accomplished declaimer who ranks in history as an accomplished orator, Æschines. There was another party quite as formidable, whose leader was Demosthenes, in favor of war with Philip; a war of extermination if necessary. So on an occasion after Æschines had addressed his partisans, indulging in wit and humor and pathos to a most remarkable degree, in favor of peace with Philip, when he had concluded his hearers with one voice said: "What a magnificent oration; what sparkling, ready wit; what delightful humor: what moving pathos!" But nobody was heard to say; "Let us make peace with Philip." But when the great Athenian had concluded one of his masterly philippics against the proud, aggressive Macedonian prince, with no disposition to indulge in, no genius for, wit and humor, but pressing home upon his hearers the necessity of war to the bitter end, nobody was heard to say: "What a magnificent oration!" Nobody was heard to say: "What an accomplished orator!" But with one voice his followers exclaimed; "Let us go and fight Philip. Let us conquer or die!"

A more modern instance will further illustrate the subject. During the first half of the present century, a case came on for trial in one of the country courts in the interior of Massachusetts. The jury had been sworn. An elderly gentleman, plain, quiet, unassuming sort of a man, came in and took a seat at the counsel table. He was a stranger to the twelve jurors. When the argument in the case was reached, it was opened for the plaintiff by local counsel. He was followed by the orator of the county, and he out-did himself in his wonderful presentation of that case. He anticipated the advent of this elderly gentleman to take part in the trial. He set the court-room in a roar; his wit, his humour, his pathos—were simply overwhelming. He won the applause of all present—even the jury! When the plain, elderly gentleman came to close the case, in a conversational way, making himself familiar with

the jury, he proceeded to tear down the arguments of his adversary, to demonstrate to that jury in his plain way the strength of his own case. When the jury retired of course the unanimous expression of the jurors was that the young fellow had made the grandest plea—plain people call arguments "pleas"—the greatest plea they had ever heard. "Yes, that is true," said the foreman, "but then I liked the way that old chap that talked last explained the case." "Yes," said another, "and I think he is right about it. He is not much of a lawyer, never would be if he practised fifty years; never could make a 'plea' like that young fellow; but it seems to me he has got the right of this case;" and the verdict was given him. Little did they know that that "old chap" was the elder Parsons; than whom few more accomplished lawyers ever stood in any court room to speak for his client. Now, which had you rather have, the applause and approval of the jury for your magnificent oratory, or the verdict that that "old chap" gathered in? (Applause.)

It is a very common error, many times a fatal one, to assume and even say that you "assume that the court knows the law;" "of course the court is familiar with the law in this case." Well, you had better, and you will if you are wise, assume that the court is densely ignorant of the law of your case (applause), and then proceed to enlighten the court upon the law of your case; for if it so be that the court does know the law of your case, all right, no harm is done; and if the court does not, you may by your fatal confidence lose your case; whereas if you would enlighten the court as you should, victory would be yours. You have devoted weeks, it may be, to the law peculiar to your case, while to the court it may all be new.

In your argument, you may, especially in reviewing courts, and more especially in courts of last resort—you may encounter questions from the bench. Few things are easier for a judge than to ask questions of counsel during the argument. Few things would be harder for him than to answer all his questions correctly. (Applause.) It has occurred to your speaker in his judicial service in past days, after having surrendered to an inquisitive impulse, that it was fortunate for the inquisitive judge that there is nothing in the constitution or statutes requiring him to answer his own questions. (Applause.) It is true there are many proper questions which may fall from the bench; for instance, concerning some controlling fact in the case, or something concerning the state of the record. Such a question you should always be prepared for; and if you cannot answer it, it is because your client has hired the wrong lawyer; but when a sort of legal catechism is entered upon by one of the judges, don't at the peril of your case undertake to answer him, unless you are very sure that you are prepared conclusively to answer the question so as to silence all cavil upon that subject.

It is well enough to promise the judicial inquisitor that after a while you will answer that question, and are thoroughly prepared for it. By the time you have concluded, it is likely the judge could not, if put to the rack, recall the question, and will probably have forgotten it altogether.

Keep your temper during the argument of the case, whether you or the adverse counsel is arguing; just keep your temper. If temper must be exhibited, if somebody must get mad during the argument of the case, by all means let it be the gentleman—or the lady—on the other side of the counsel table.

Now, ladies, please don't accuse, nor even suspect your speaker of supposing impossible conditions in order to illustrate his point. Not many years ago a lady lawyer—for she was both a lady and a lawyer—came into the court of last resort of this State, and alone, against three of the ablest male lawyers in the State, presented and argued her case—and she behaved like a gentleman, too. Now, what is meant by that is, that she fought fair and won her case, not because she was a lady and the judges were men, but because after thorough preparation, a thing indispensable in every case, she was able by a dignified statement to demonstrate to those five cold-blooded judges that the courts below had erred to the fatal prejudice of his client.

So, returning from a somewhat lengthy and complicated parenthesis —if somebody must be mad, let it be the gentleman or the lady on the other side of the counsel table. It may be well enough to suggest that you have observed—if it is the other one that is getting mad—that a lawyer usually begins to lose his case and his temper about the same time. He may get madder yet, or it may make him good natured—in either case the victory is yours.

Never apologize for an argument under any circumstances or conditions. Please don't forget that. Never let the court or jury—or your client—know or suspect that you are not doing your very best all the time. The argument, or the address, or discourse of any kind, which requires an apology ought never to be delivered. If the performance is or promises to be one which calls for an apology, it is too long at best—don't you see?—and it is weakness, no, it is wickedness to prolong its wretched life with a miserable apology. Do not antagonize the court. Adverse counsel will furnish you employment without going up against a hostile court.

Having quoted Latin to the judge, it is a thing at best of debatable propriety to translate it for him into English. Besides, it is an unne-

cessary reflection upon the classical and literary accomplishment of the judge. If your suspicious that that judge will not know what your Latin means are well founded—why, English is good enough for him.

As to the length of an argument: of course there is no iron rule to guide counsel upon that subject. Some lawyers seem to talk to rest their brains; some lawyers seem—now, please don't suspect the speaker of originality in this statement—some lawyers seem inspired by an ambition to make their speeches immortal by making them eternal; but keep in mind always that an argument which, throughout its delivery, thoroughly interests, instructs and entertains the court and jury, cannot within the limits assigned it, very well be too long; the argument which does neither cannot very well be too short.

Charles Dickens in his "Pickwick Papers" put into the mouth of Sammy Weller, during that profound philological discussion between Sam and his father, old Tony Weller—"the governor," as he called him—some philosophy concerning letter-writing which might also find appropriate application to an argument in court, or any other sort of address or discourse. You will remember that while they were concocting that immortal valentine—it was a brief one—Tony Weller, the old coachman, thought it was too brief, that the conclusion was rather abrupt; so he suggested to Sammy: "Rather a sudden pull up, ain't it, Sammy?" Then Sammy perpetrated this flash of philosophy: "Governor, the way to write letters is to write 'em so that when they've read 'em they'll always wish there was more!" It seems to your speaker that it would many times be wise to apply that philosophy to speech-making—especially to court-room arguments.

But, young gentlemen, after all, nothing contributes so powerfully to the success of court-room oratory as a pure life! Let the court and jury come to suspect that you have a serious impediment in your veracity; in other words, let them once lose confidence in you as a man, in your word and in your sincerity, and you might just as well sit upon the counsel table and fiddle for that court and jury as to talk to them. No matter how profound, no matter how sound, no matter how logical, no matter how powerful otherwise your argument may be, it will be vain: and your adversary, if he be a man in whom the court and jury have confidence, who has so deported himself in his practice that they believe him to be an honest, sincere and truthful man, has a vast—it may be an overpowering—advantage of you.

So, my friends, from a field almost boundless in its proportions—rich in its resources, a few sheaves have been gathered at the hands, it

may be, of an awkward gleaner, and laid at your feet. If your speaker has been able, by his presentation of these few branches of a subject so vast, to instruct without wearying you, to entertain without offending you, his highest ambition for the occasion ought to be, and you may be sure it is, abundantly appeased.

You see how impossible it is to traverse the entire field of oratory of the court-room in a single address.

Nothing is more important, unless it is the introductory statement of an argument, than its conclusion. One of the richest and rarest gems of court-room oratory is an artistic conclusion. Say the things which you deem the subject calls for. Omit the unnecessary and the doubtful things. Unnecessary things are vicious; doubtful things are dangerous.

You may encounter an extremity sometimes when you feel there is some statement you ought to make, something which the court and jury ought to hear, and you hesitate for fear it may give offence to somebody. You may do well to remember that it is not in the clear open field of forensic combat, but it is in the narrow passes of professional warfare that your metal is to be tested. You may encounter an occasion, if you have not already, where you feel that your high duty as counsel and as advocate calls upon you to make some statement that has so far been withheld. It may be well in such extremity to take counsel of the words of that wise and brave man who said:

"Speak! no matter what betide thee;
Scorn the dungeon, rack and rod;
If a free thought seek expression
Speak! and leave the rest to God!"

(Applause.)

Having then said these things which the subject and the occasion call for and require, having said them as acceptably as you may, dealing with the salient, the strong, the vital points in your case, after thorough preparation, then achieve as you may the proudest and richest trophy of court-room oratory, and, imitating in this one thing the example of your speaker, simply quit.—*The Albany Law-Journal.*

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Right of Privacy:—In the recent decision in Atkinson *v.* John E. Doherty & Co., heretofore referred to in these columns, the Supreme Court of Michigan took somewhat radical ground against the so-called right of privacy. The action was brought by the widow of Col. John Atkinson, for an injunction against the defendants to prevent the con-

tinued use in their business of her husband's name as a trademark for the sale of cigars. The defendants were selling a brand of cigars which they advertised as "The Col. John Atkinson Cigar," and they also put them upon the market under a label bearing the name and a likeness of Col. John Atkinson. The Michigan court, in deciding against the claims of the plaintiff, used the following language:

We are not satisfied that the homes and landscapes are so entirely within the control of owners that one commits an unlawful invasion of the rights of privacy in looking upon their beauties, or by sketching or even photographing them, or that one has a right of action either for damages or to restrain the possessor of a camera from taking a snap shot at the passerby for his own uses. If we admit the impertinence of the act, it must also be admitted that there are many impertinences which are not actionable, and which courts of equity will not restrain. As the right alleged is not a property right, and does not spring from any contract, it must follow that relief must be in an action for damages for a breach of duty upon an actionable wrong, or a suit to prevent a threatened injury. In either case such action must be based upon an act done or threatened which the law looks upon as a tort; and, if the act complained of is one which is not in the law denominated a wrong, there is no legal remedy. All men are not possessed of the same delicacy of feeling, or the same consideration for the feelings of others. These things depend greatly upon the disposition and education. Some men are sensitive, some brutal. The former will suffer keenly from an act or a word that will not affect the latter. Manifestly, the law cannot make a right of action depend upon the intent of the alleged wrongdoer, or upon the sensitiveness of another. Although injuries to feelings are recognized as a ground for increasing damages, the law has never given a right of action for an injury to feelings merely. Slander and libel are based upon an injury to reputation, not to feelings; and, although many offensive things may be said that injure feelings and shock and violate the moral sense, even though they be untruthful they are not necessarily actionable. To make them so they must be of such an atrocious character that the law will presume an injury to reputation, or special damage to property interests must be alleged and proved. What becomes of the innumerable cases of ill natured and perhaps insulting and immoral things that may be said about persons? The answer is that in an enlightened effort to preserve the liberties of man, upon the one hand, and to prevent invasion of their liberties, upon the other, it has been found that a line of demarkation must be drawn which affords a practical balance and satisfactory test of liability. Mr. Bishop, by his "Diagram of Crime," has made plain the fact that there are many wrongs against the public that are not indictable because too small for the law to notice (I Bish. Cr. Law, sec 600). The same is true of private wrongs. Hence, that which would be slanderous *per se* if said in the presence of a third person is not actionable if addressed to the object of the remark, in

private. The law does not discriminate between persons who are sensitive and those who are not, and the brutality of the remark makes no difference. Yet the alleged "right to privacy" is invaded. The wisdom of the law has been vindicated by experience. This "law of privacy" seems to have obtained a foot hold at one time in the history of our jurisprudence—not by that name, it is true, but in effect. It is evidenced by the old maxim, "The greater the truth the greater the libel," and the result has been the emphatic expression of public disapproval by the emancipation of the press and the establishment of freedom of speech and the abolition in most of our States of the maxim quoted by constitutional provisions. The limitation upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth that can be presumed or shown to the satisfaction, not of the plaintiff, but of others (*i.e.*, an impartial jury) to be injurious, not alone to the feelings, but to the reputation, is actionable. Should it be thought that it is a hard rule that is applied in this case, it is only necessary to call attention to the fact that a ready remedy is to be found in legislation. We are not satisfied, however, that the rule is a hard one, and think that the consensus of opinion must be that the complainants contend for a much harder one. The law does not remedy all evils. It cannot, in the nature of things; and deliberation may well be used in considering the propriety of an innovation such as this case suggests. We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that, under the law, cannot be redressed.—*The Albany Law Journal.*

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The Teaching of Law at Harvard:—The Contemporary Review of November last contains a very interesting article on the 'Teaching of English Law at Harvard' by Professor Dicey. The whole article is well worth perusal especially in view of the interminable discussions which are going on as to the constitution and method of teaching at the Madras Law College. Professor Dicey bestows very high praise on the system of instruction persued at Harvard. He says that "the Law School forms a sort of University within the University. Its library constitutes the most perfect collection of the legal records of the English people to be found in any part of the English speaking world. We possess nothing like it in England." * * * "But it is in its students and its Professors, in its crowded lecture rooms and its admirable teaching that lies the true glory of Harvard."

The Professor then proceeds to say 'that the most salient and original feature in the Harvard method of instruction is that tuition is in the Law School grounded upon the study of cases, and is in its

form catechetical. The way in which this system works is curious. Suppose a student utterly unacquainted with law, as are most young men when they enter the Harvard Law School, to be an attendant at Professor Ames's Lectures on the Law of Contract. From the first moment he joins the class he has placed in his hands the huge collection of contract cases edited by Langdell. The cases are placed under different heads, as for example, under "offer and acceptance" and under each head are arranged in historical order. Our student is neither assisted nor confused by printed comments. He is left without the aid even of head notes: he knows that he must prepare for the lecture or as it is sometimes aptly called 'exercise.' Say the first nine or ten cases in the book. He reads, I presume in some book on the Law of Contract the chapters bearing on the topic in hand. He then comes with from 100 to 200 companions to the lecture. Professor Ames has the names of the students before him. He calls now upon one, now upon another, to state the result of a definite case. He asks questions about it; he suggests in the way of question variations on the case; he states in the form of observation its real gist. This plan of plunging a pupil at once into a mass of cases seems when one first hears of it, a hopeless one. As a matter of fact, its success in the hands of a master such as Professor Ames, is patent. It is the Socratic method applied to law and is infinitely stimulating. The whole class are kept alive. Foolish answers or impertinent answers and, of the latter I heard none whatever, are checked by the capacity of the teacher and the opinion of the class. No man willingly plays the fool before his class-mates. What to me was more surprising was the way in which skilful catechetics not only exhausted every case but brought out the general principle which the cases or set of cases illustrate."

"The proportion in which current dissertation ought to be mingled with questions must be regulated by the nature of the topic to be taught and in accordance with the judgment of the teacher * * * and this system (of question and answer) as conducted by lawyers of eminence has two special merits. In the first place, it forces young men to rely on their own efforts rather than let themselves be taught and must be a great preservative against cramming. It gives the students at Harvard much the same kind of stimulus which is felt by a young man when he begins to read for the Bar, and having entered chambers is called upon for the first time to draft a claim or write an opinion. The claim is drawn wrong and the opinion is worthless but the student's effort to obtain knowledge by applying his mind to the solution of a given case is worth more than scores of lectures.

The Harvard system in the next place calls into play the disputatious instincts of the whole class. Great, indeed is the value of the art of contradiction. Young men learn more from wrangling than from reading. The problems of the lecture room turn into the disputes of the boarding house and points of law are discussed with the eagerness and with the ignorance with which in Oxford, some 40 years or more ago, young men used to discuss, as I trust they still do discuss, problems raised by the Ethics or the Politics of Aristotle."

* * * *

It is what a student thinks and talks about outside the class room for more than what he hears in lecture which gives him his true education: and for the success of the Harvard method it is essential that students should be perpetually engaged in the examination and discussion of cases. This end is achieved by the encouragement of two institutions, both characteristic of Harvard.

First.—The Law Club and the Moot Courts. Law clubs are the creation of students though they are favored by Professors. The Moot Court is a University institution. It is a meeting at which the whole Law School is assembled and whilst a Law Professor sits as judge young men generally in their third year argue some difficult point of law in the manner which would be required of a barrister when appearing for instance before Supreme Court of the United States. In the Law Schools throughout the union there Moot Courts exist and care is taken to train young men in every kind of argument in which when they begin to practise they may be called upon to take part. At the Boston Law School for example—I heard two young gentlemen make an application for amendment of pleadings. Nothing in its way could be better. The truth is that whether in the clubs or in the Moot Courts young men gain an amount of practical training which must be invaluable and the want whereof hampers every English Barrister however able or learned when for the first time he has to address a real jury or argue before a real judge. But the practical advantages obtained from the Law clubs and Moot Courts sink into nothing compared with the benefit which these institutions confer upon students by kindling ardent interest in legal problems.

Secondly.—The Harvard Law Review.

If the law clubs stimulate debate the Review encourages learning. Its pages contain admirable work by the ornaments of the American Bar and the American Professoriate. But the whole Review is known to all Englishmen interested in legal education. Few of us are aware that this

important periodical is managed by the students of the law school. Admission to the editorial body consisting of some 16 or 17 persons is an object of natural ambition to the elder students. To take point in the work of editing is one of the best occupations of men in their third year who having reached the age of about 24 or 25, have advanced far on the road towards the acquisition of sound knowledge.

The constant and scientific study of cases under the guidance of eminent lawyers, practice in the law clubs or Moot Courts, assiduous labour in the editing of the Law Review, these are the means by which the teachers of Harvard keep alive the vivid interest of students in the problems presented by the living law of England and America. Hence their splendid and undoubted success.

NOTES OF AMERICAN CASES

The failure of the payee of a check promptly to present it for payment is held, in Hamlin *v.* Simpson (Iowa) 44 L. R. A. 397, to effect a release of the maker if he is injured thereby, where the bank subsequently fails, although his general deposit in the bank was overdrawn at the time, if he had a special deposit which he had reasonable grounds to believe would be used to pay the check.

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A broker is held to be the procuring cause of a sale in Hoadley *v.* Savings Bank of Danbury (Conn.) 44 L. R. A. 321, when he called a person's attention to the property and gave him information as to how to obtain admission thereto, although, without his knowledge, the owner subsequently took up the negotiation and completed the sale. An extensive collection of the authorities on the question when a real-estate broker may be considered the procuring cause of a sale is furnished in a note to this case.

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The pretense by a man that he is unmarried, upon which he procures money from a woman on a promise of marriage is held, in State *v.* Renick (Or.) 44 L. R. A. 266, insufficient to make him punishable for false pretenses through the use of himself as a false token.

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The murder of a person whose life is insured, committed by an assignee of the policy, whose claim to it is valid only for reimbursement of premiums paid, is held, in New York Life Ins. Co. *v.* Davis (Va.)

the profits, while falsely representing themselves as rival bidders, is held, in Hoffman *v.* McMullen (C. C. App. 9th C.) 45 L. R. A. 410, to be void so that no accounting of the profits can be compelled.

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A statutory right of a stockholder to inspect the books, documents, and records of a corporation, is sustained in Weihenmayer *v.* Bitner (Md.) 45 L. R. A. 446, even when he is a business rival of the corporation and seeks information to be used to its injury and loss.

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But in *Re* Steinway (N. Y.) 45 L. R. A. 461, the court, sustaining the common law right of a stockholder to inspect the books of the corporation, goes no further than to say he has a right to inspect them at a proper time and place and for a proper purpose.. With these cases there is an extensive note reviewing the other authorities on the subject.

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Notes and a deed given to settle a claim against the maker's son-in-law and release him from arrest for felony are held, in Loud *v.* Hamilton (Tenn.) 45 L. R. A. 400, to be valid as against a claim of duress, when the maker entered into the transaction deliberately, after manœuvring for a compromise, and on an understanding with his daughter that the payment should constitute an advancement to her.

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Threats to arrest a man for embezzlement unless his wife will execute a mortgage are held, in Mack *v.* Prang (Wis.) 45 L. R. A. 407, sufficient to consitute duress which will avoid a mortgage made by her, if the threats were sufficient to control her will; and the case also holds that the defense of duress in case of negotiable paper is cut off by transfer to a boná fide holder.

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A man who has a cold, on account of which he is in bed, is held, in Barnes *v.* Fidelity Mutual L. Asso. (Pa.) 45 L. R. A. 264, to be, nevertheless, "in good health," within the meaning of a clause in a life insurance policy which requires the premium to be paid while he is in good health, although pneumonia sets in, in a day or two after the premium is paid, and proves fatal.

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An agreement by a member of a building and loan association to insure his life and permit the policy to be used as collateral security for a loan to the association is held, in Tate v. Commercial Building Asso. (Va.) 45 L. R. A. 243, to be void as against public policy.

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Mere temporary use of a machine for threshing grain for a few hours on the premises where insured property is located is held, in Adair v. Southern Mutual Ins. Co. (Ga.) 45 L. R. A. 204, to be insufficient, *per se*, to cause a forfeiture or suspension of the policy, under a provision that it shall be forfeited by any change which increases the degree of the risk, as the court construes this to apply to changes of a permanent nature.

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The power of a state court of equity to entertain a bill to set aside a judgment obtained by fraud in a Federal Court is sustained in Wonderly v. Lafayette County (Mo.) 45 L. R. A. 386, where the claim was that the jurisdiction of the Federal Court was fraudulently invoked by false representation as to the citizenship of the parties.

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A surety who has paid a judgment against himself and his co-sureties on account of the principal's debt is held, in Merchants' Nat. Bank v. Great Falls Opera House Co. (Mont.) 45 L. R. A. 285, to be entitled to an assignment of it as a basis for enforcing contribution from his co-sureties.

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Payment to a *de facto* officer is held, in Rasmussen v. Carbon County Comrs. (Wyo.) 45 L. R. A. 295, to constitute no defense to an action brought by a *de jure* officer for the salary of an office to which he has been legally declared entitled from the commencement of the term, except when he is himself in default by failure to qualify.

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A person approaching a railroad crossing at which a train is standing on a side track to receive or discharge passengers is held, in Betts v. Lehigh Valley R. Co. (Pa.) 45 L. R. A. 261, to be not guilty of contributory negligence in failing to stop, look, and listen before attempting to cross the main track, when he knows of a rule of the carrier, requiring a train to stop before reaching a station at which another train is receiving or discharging passengers.

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A ten year lease of a railroad, which is fair in its terms, is upheld in state, *ex rel.* Nolan, *v.* Montana R. Co. (Mont.) 45 L. R. A. 271, against the contention that it involves an abandonment of the railroad enterprise or violates the constitutional provision against consolidation of parallel or competing railroads or the uniting of their business or earnings. The court holds that railroads are competing when, by their connections, though not entirely by their own lines, they have the opportunity, by their geographical situation, to cut rates to certain principal or terminal points. With this case is a note which reviews and analyzes the authorities on the restrictions on the consolidation of parallel or competing railroads.